

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 27

Docket No. PH-0752-09-0568-B-1

**Keith Andrew Fields,
Appellant,**

v.

**United States Postal Service,
Agency.**

March 6, 2012

Stanley C. Mason, Joppa, Maryland, for the appellant.

Stephen W. Furgeson, Esquire, Landover, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the remand initial decision that dismissed as untimely filed the appeal of his alleged constructive suspension. For the reasons set forth below, we GRANT the appellant's petition, VACATE the remand initial decision, and REMAND the appeal for further adjudication, consistent with this Opinion and Order.

BACKGROUND

¶2 Effective June 19, 2009, the agency removed the appellant, a preference eligible, from his PS-6 Mail Processing Clerk position based on his having been absent without leave (AWOL) since June 7, 2008. MSPB Docket No. PH-0752-

09-0568-I-1, Initial Appeal File, Tab 6, Subtab 4a. On appeal, he challenged the merits of the removal action and also claimed that the agency had improperly placed him in a nonduty, nonpay status for more than 14 days when it did not allow him to return to duty following an arbitrator's award ordering his return to duty. Based on the AWOL charge, the administrative judge sustained the agency's removal action. MSPB Docket No. PH-0752-09-0568-I-2, Initial Appeal File, Tab 14 (Initial Decision). He did not, however, entertain the appellant's constructive suspension claim.¹ *See id.* at 3.

¶3 The Board granted the appellant's petition for review of that initial decision, finding, *inter alia*, that the administrative judge erred in not considering the appellant's constructive suspension claim, in failing to provide him adequate notice and an opportunity to present evidence and argument that raises a nonfrivolous allegation of an appealable constructive suspension, and in failing to afford him the right to prove, at his requested hearing, that he was constructively suspended. *Fields v. U.S. Postal Service*, MSPB Docket No. PH-0752-09-0568-I-2, Remand Order (RO) at 5-7 (Apr. 4, 2011). The Board further found that, to make a nonfrivolous allegation of jurisdiction over his alleged constructive suspension, the appellant, who had been absent from duty since sometime in 2007, and certainly since February 2008, must nonfrivolously allege that he was able to work within certain restrictions, that he communicated to the agency his willingness to work, and that the agency prevented him from returning to work. *Id.* at 7. The Board then found that the appellant had made a nonfrivolous allegation of jurisdiction because he had asserted facts which, if proven, could establish that he was constructively suspended for more than 14 days when the agency denied his request to return to duty, and that his allegations merited a

¹ The administrative judge found that the Board lacked jurisdiction to enforce the arbitration award, that Postal Service employees do not have a right to Board review of an arbitration decision, and that the appellant's avenue of redress was to the arbitrator. Initial Decision at 3.

hearing. *Id.* The Board remanded the appeal to afford the appellant an opportunity to prove jurisdiction by preponderant evidence and stated that, to prevail on his claim, he must prove that he was able to perform the full duties of his position of record or that the agency improperly failed to accommodate him with a light-duty assignment. *Id.* at 7-8. The Board noted that the appellant's appeal appeared to have been untimely filed and directed that, on remand, the administrative judge should, to the extent necessary, decide whether good cause existed for the apparent untimely filing of the appeal. *Id.* at 8 n.4.

¶4 On remand, the administrative judge issued a general timeliness order, stating that the filing period in this case began in February 2008, the date of the arbitration award, that the appellant filed the appeal on July 16, 2009, and that “[i]t therefore appears that your appeal was filed late.” MSPB Docket No. PH-0752-09-0568-B-1, Remand Appeal File (RAF), Tab 2 at 2 (emphasis in the original). The administrative judge ordered the appellant to file evidence and argument showing that good cause existed for his filing delay. *Id.* at 3. Both parties filed submissions. RAF, Tabs 4, 5.

¶5 Thereafter, the administrative judge issued a remand initial decision, *id.*, Tab 6, Remand Initial Decision (RID), in which he found that the appellant had not established that he ever communicated to the agency that he considered his continued absence to be a constructive suspension, that therefore the agency was not required to provide him with notice of his Board appeal rights, *id.* at 5-6, and that, absent such a duty on the agency's part, the appellant had to establish that he exercised due diligence in discovering and pursuing his appeal right before the Board in order to excuse his untimely filed appeal, but that he had failed to do so. *Id.* at 6-7. Accordingly, the administrative judge dismissed the appeal as untimely filed with no showing of good cause for the delay. *Id.* at 7.

¶6 In his petition for review, the appellant argues that the administrative judge erred in resolving his appeal on the basis of timeliness without first determining

whether he was subjected to an appealable action. MSPB Docket No. PH-0752-09-0568-B-1, Petition for Review File, Tab 1 at 4-7. We agree.

ANALYSIS

¶7 Although the existence of Board jurisdiction is a threshold issue, in an appropriate case, an administrative judge may dismiss an appeal as untimely filed if the record on timeliness is sufficiently developed and shows no good cause for the untimely filing. *Hanna v. U.S. Postal Service*, [101 M.S.P.R. 461](#), ¶¶ 4, 6 (2006); *Popham v. U.S. Postal Service*, [50 M.S.P.R. 193](#), 197 (1991). Such an approach is not appropriate, however, if the jurisdictional and timeliness issues are “inextricably intertwined,” that is, if resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. *Hanna*, [101 M.S.P.R. 461](#), ¶ 6. The issues of timeliness and jurisdiction are generally considered to be inextricably intertwined in a constructive suspension appeal because a failure to inform an employee of Board appeal rights may excuse an untimely filed appeal, and whether the agency was obligated to inform the employee of such appeal rights depends on whether the employee was affected by an appealable action. *Id.*

¶8 In the April 4, 2011 decision, the Board found that the appellant nonfrivolously alleged that, following issuance of the arbitrator’s award ordering his return to duty, he communicated to the agency his desire to work within his medical restrictions, which he provided, but that, although the agency had previously accepted these restrictions, the Manager rejected them and would not allow the appellant to return to duty until he provided updated restrictions. RO at 7. By these claims, the appellant raised a question as to whether his absence from the workplace was voluntary. And, it necessarily follows that a question exists regarding whether the agency was required to provide him a notice of appeal rights.

¶9 If the appellant can prove that he was constructively suspended, then he will have established that he was affected by an appealable action and the agency would have been obligated to inform him of his appeal rights. If the agency was so obligated, then the appellant's only duty vis-à-vis the Board's filing deadline would have been to act promptly once he became aware of the basis of his claim. *Edge v. U.S. Postal Service*, [113 M.S.P.R. 692](#), ¶¶ 10-11 (2010); *see Gordy v. Merit Systems Protection Board*, [736 F.2d 1505](#), 1508 (Fed. Cir. 1984). Here, the appellant affirmed under penalty of perjury that he was unaware of the right to appeal to the Board until he received the letter of decision on his removal. RAF, Tab 4 at 2.

¶10 Because resolution of the timeliness issue depends on whether the appellant was subjected to an appealable constructive suspension, and because the administrative judge did not make jurisdictional findings, as the Board directed, it was improper for him to dismiss the appeal as untimely filed.² *Edge*, [113 M.S.P.R. 692](#), ¶ 12; *Higgins v. U.S. Postal Service*, [86 M.S.P.R. 447](#), ¶ 10 (2000).

² Contrary to the administrative judge's statement in the Remand Initial Decision, the Board did not remand the appeal for consideration of the appellant's constructive suspension claim "following a determination" of whether or not good cause exists for the apparent untimely filing of the appellant's appeal. RID at 4. Rather, noting the apparent untimeliness of the appeal, the Board directed the administrative judge, on remand, to decide "to the extent necessary," whether good cause exists for the apparent untimeliness. RO at 8 n.4.

ORDER

¶11 Based on the foregoing, we VACATE the remand initial decision and REMAND the appeal to the Northeastern Regional Office for further adjudication consistent with this Opinion and Order.³

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.

³ In convening the jurisdictional hearing to which the appellant is entitled, the administrative judge is directed to the Board's guidance, as set forth in the Remand Order, regarding the status of the appellant's representative as a possible witness. RO at 9-10.